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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.
No. 596

JOHN G. RUHLIN, JENNIE B. RUHLIN, et al.,
Petitioners

v.

NEW YORK LIFE INSURANCE COMPANY,
Respondent

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

REPLY BRIEF FOR PETITIONERS.

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REPLY BRIEF FOR PETITIONERS

Respondent, in its brief, iterates and reiterates the following contention:

> "The **only** purpose of an incontestable clause is to bar defenses which attack the *validity* of the contract." (p. 8)
>
> "The **only** way the second exception in the incontestability clause can be given effect is by applying it to defenses which would otherwise be barred by the incontestability clause, and not by the useless gesture of applying it to defenses which could be raised even if the second exception were not in the incontestability clause." (p. 10)
>
> "Since, then, an incontestability clause applies **only** to defenses *which existed when the policy issued,* or which attack the validity of the contract, the exception to that clause could **only** apply to defenses of a similar character, such as fraud in the procurement of the insurance." (p. 11) (Emphasis supplied.)

But respondent does not always argue that way. Here is what respondent said in another case, when it was explaining how its incontestability clause came to be drawn in that fashion *and what purposes it had in mind* in so drafting it:

> "As pointed out in the quotation from the Deem case, pages 15 and 16 of our argument, the complainant, when it drafted this clause was confronted by early decisions in the federal court, and decisions in some of the state courts that failed to distinguish between a 'denial of coverage and a defense of invalidity'. It was confronted with the problem of drafting a phrase that would allow it to except the

> total disability and double indemnity provisions of the policy from the incontestability clause. It was also confronted with the problem of making it plain that its exception was broad enough to allow it not only to contest the validity of the policy in its inception but also to deny liability where recovery was sought for some injury or on some ground not covered by the total disability or double indemnity provision."[1]

We have the respondent making an argument in one case that the *only* purpose of their incontestable clause is "to bar defenses which attack the validity of the contract", and in another case that it had two purposes in mind in drafting it, the one above mentioned and the other, to clearly reserve the defense of lack of coverage because, as they say further in their letter: "It was advisable, if not necessary, . . . to fully protect itself against misunderstanding upon the part of some court which might fail to distinguish between 'a denial of coverage and a defense of invalidity' ".

> In the concluding paragraph of our brief, we said:
>
> "It is reasonable to conclude that respondent, knowing of the diversity of decisions, and anticipating that it might be sued in a jurisdiction which holds that the incontestable clause bars defenses for future occurrences—non-fulfillment of the provisions and conditions in the policy that deal with matters of coverage—drew the second, as well as the first, exception to incontestability so as to save to itself such defenses."

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[1]This argument was made by the respondent on January 22, 1938 in the case of New York Life Insurance v. Malloy, Equity 306, pending before Hon. George S. Morris, Judge of the Federal District Court for the District of New Hampshire, in a letter from counsel for respondent to the Judge, a full copy of which is printed as an appendix to this brief.

Respondent, in its brief in *this* case, denies our construction of the clause and the explanation we give why they included prospective matters of defense, such as that a claim made was not covered by the provisions and conditions of the policy. Now, after our brief was printed, we find that in the Malloy case it made the same contention we did and assigned the very reason we did, although it claims it had, also, another purpose in mind in using the language which it did. Respondent may say that different counsel employed by it have a right to ascribe different purposes for the identical clause. But these different purposes are nothing more than different constructions of an act of the respondent, the form of the incontestable clause.

The responsibility for the failure of the courts to always distinguish between "a denial of coverage and defense of invalidity", which respondent referred to in the Malloy case, rests upon the insurance companies themselves, for they created the difficulty. They expect the distinction to be made by the courts' assigning to the word "provisions" the meaning which the word "policy" usually conveys, and they want the courts to understand that when the insurance companies use the word "restrictions" and "conditions" they mean "matters of coverage". Even assuming that courts ought to understand, how can the average layman appreciate these fine points?

The respondent has a fashion of charging everyone —counsel and judges—who fail to agree with them with obtuseness and an inability to comprehend the distinction between a defense of invalidity of the policy because of alleged fraud in its inception and a defense that a claim for disability is unfounded because it does not come within the terms and conditions of the policy. That is not such an intricate matter to understand. As regards the writer, the respondent makes that charge on page 13 of its brief,

wherein it says we confuse these two distinct defenses. We went into that matter pretty fully on pages 24 to 26 of our brief and believe our brief shows we have some glimmering of the subject. So, this respondent made a similar complaint against the Circuit Court of Appeals for the 9th Circuit which decided the case of Kaufman v. New York Life Insurance Co., 78 F. (2d) 398. That court, in its second opinion, page 404, shows that it did have some conception of what the case was about in the following:

> "The insurance company's petition for rehearing urges that the court's second construing of the incontestability clause, with reference to the application portion of the contract, fails to distinguish between the subject-matter of the contests arising under the provisions of disability insurance and the grounds of those contests. It contends that the provisions and conditions of the incontestability clause are all 'subjects' of contest, and hence the only 'ground' of contest is the fraud in the application. The suggestion would be pertinent if well founded. An analysis of the petition's argument shows that it otherwise supports the contentions of the insured, and he is entitled to have it stated in this supplement to the opinion.
>
> "In its petition the insurance company now agrees with appellant's contention that the insured layman would interpret the words of the incontestable clause in the policy 'except as to the provisions and conditions relating to disability benefits' as an 'express exception' into contestability of each of the several provisions and conditions 'which appears *in* the *policy*,' for the purpose of making certain that the company could maintain contests 'as to' them. This interpretation of the company is stated in the

> petition as follows: 'We, therefore, respectfully urge that so far as the subject of contest is concerned, every *condition and provision* which appears *in the policy of insurance,* whether on page 1 or 2 thereof, is *expressly* excepted from the effect of the incontestable clause, and any and all of such conditions and provisions may be contested on any *grounds* affecting their validity subsequent to the expiration of the two-year period referred to in the incontestable clause.***"

We wonder whether respondent expects a layman to understand these involved and difficult to comprehend contentions. It is with such arguments they expect the court to hold the incontestable clause means what they say it means. We contend that from the fact that they introduce the exceptions with something that is clearly prospective—non payment of premiums—they get the mind in the direction of thinking that the other matters —provisions and conditions of the disability benefits— are also prospective, something that may arise in the future. We have shown by their contentions in the Malloy case, that they split the expression "provisions and conditions" in two parts—one, "provisions", which they say saves the defense of original invalidity, and the other, "conditions", which they argue applies to prospective matters, controversies about coverage.

A curious argument is made by respondent, curious because it has maintained time and again, as we have shown above, that the second exception deals *only* with the defense of invalidity in inception:

> "Even if the exception in the incontestability clause of the provisions relating to disability and double indemnity benefits might also be applied to events occurring after the issuance of the policy, such as death of the insured by suicide or in an air-

> plane crash (the latter being also a risk specifically excepted from the double indemnity benefit), still that is no reason why that exception should not also be applied to events which occur before the issuance of the policy, in so far as they affect the disability and accidental death insurance." (p. 18)

This is a very guarded admission but the effect of it is important. If it conceded that the second exception could be construed by some people to apply to events occurring after the issuance of the policy, it amounts to an admission of an ambiguity.

Respondent claims that the weight of authority is with it and in support of that claim cites some cases where the question here involved was not the real issue (such as Kaffanges v. New York Life Ins. Co., 59 F. (2d) 475,[1] Mayer v. Prudential Ins. Co., 121 Pa. Superior, 475[2]), two lower court cases in New York and Pennsylvania involving the clause in a Mutual Life policy, which were decided before this court decided the question in the Stroehmann case the other way (Mutual Life Insurance Co. v. Union Trust Co., 280 N. Y. S. 217 and Mutual Life Ins. Co., v. McConnell, 20 D. & C. 250) and cases involving policies of other life insurance companies where the language was not the same. Honest and capable judges, striving, as did the other judges which passed upon the question, to determine the meaning of

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[1] "Two main issues were involved: (1) Were the statements contained in the application false and made to deceive, or, if false, did they materially increase the risk? (2) Was their falsity waived by the appellee with knowledge of the appellant's condition by the acceptance of the premiums on the policy in August, 1929, and August, 1930?" Kaffanges v. New York Life Ins. Co., 59 F. (2d) 475, 476.

[2] "It will be noted that the defense set up does not in any manner attack the validity of the policy itself, but alleges that the total disability occurred prior to the payment of the first premium, and therefore, came within the express provision 'that such total disability shall occur after the payment of the first premium on this policy while the policy is in full force and effect. . . .'" Mayer v. Prudential Insurance Co., 121 Pa. Super. 475, 479.

the incontestability clause, have held that it does not save the defense of fraud against a part of the insurance contract or that, at any rate, it can be interpreted in two ways. The argument of weight of authority is irrelevant in such a case.

We do not rely upon the conflicting constructions and explanations of this clause by various counsel for the respondent, although we might do so. Neither do we depend upon the conflicting conclusions as to its meaning reached by many courts and upon the reams of bewildering and abstruse analyses and arguments to support them, although it would be logical if we did. We rest most confidently upon the fact that the average man, reading the policy which has been sold to him as incontestable, if he lives two years after it had been written and pays his premiums, when he reads the statement:

> "Incontestability — This policy shall be incontestable after two years from its date of issue except for non-payment of premium and except as to provisions and conditions relating to Disability and Double Indemnity Benefits"

would believe that he has a policy such as he has been led to believe he will receive. The insurance company is at fault in so drafting the clause as to give the impression that the *policy* is incontestable except that a claim for the moneys promised may be contested if the premiums are not paid or if the insured, while disabled, is not permanently disabled, or, having been disabled, has recovered. A lawyer may stumble on the fact that this clause may be argued to mean what respondent says it means but it would take considerable explanation to a layman to make him see it.

Lots of learning and wisdom have been wasted by courts and counsel on the incontestability clause in a

Mutual Life policy but this court disposed of the matter very quickly in a few lines, easy to read and understand. We have shown the substantial similarity of the two clauses in our brief (pp. 9-11). To the average person, they are substantially alike, even if he does not make as detailed a comparison as we have made.

Respectfully submitted,

CHARLES J. MARGIOTTI,
CHARLES H. SACHS,

Counsel for Petitioners.

APPENDIX

January 22, 1938

Hon. George F. Morris,
Concord,
New Hampshire.

Dear Judge Morris:

RE NEW YORK LIFE INS. CO. v. MALLOY
EQUITY No. 306

I do not wish to further cumber the record with any extensive argument in reply to the respondents' reply brief on the question of incontestability. It seems to me that the respondents' argument introduces no new thought into the case and that it is completely answered by the section of our original argument on this question. I should like, however, to make one or two brief suggestions which I think may be of assistance to the court in arriving at a decision on this question.

The existence of the ambiguity which the respondents argue so hard and at such length to demonstrate could hardly have escaped the attention of the circuit court of appeals in the Kaffanges case and able counsel for the respondents in this case would never have had to wait for the complainant's argument on this question to discover it. The respondents' argument on this question will not bear critical analysis and is completely answered by a critical analysis of the language used. This is to be found in the quotations from the Pyramid case appearing at the top of page 20 and at the bottom of page 23 of our original argument. As pointed out in the quotation from the Deem case, pages 15 and 16, of our argument, the complainant when it drafted this clause was confronted with early decisions in the federal court and decisions in some of the state courts that failed to dis-

tinguish between "a denial of coverage and a defense of invalidity". It was confronted with the problem of drafting a phrase that would allow it to except the total disability and double indemnity provisions of the policy from the incontestability clause. It was also confronted with the problem of making it plain that its exception was broad enough to allow it not only to contest the validity of the policy in its inception but also to deny liability where recovery was sought for some injury or on some ground not covered by the total disability or double indemnity provisions. Having provided that the *policy* should be incontestable except as to the "provisions" relating to total disability and double indemnity, it was advisable if not necessary to add the word "conditions" to fully protect itself against misunderstanding, on the part of some court which might fail to distinguish between "a denial of coverage and a defense of invalidity". The respondents' argument entirely overlooks this situation, fails to note the very plain distinction between a provision that "this *policy* shall be incontestable . . . except *as to* provisions and conditions relating to disability and double indemnity benefits" and a provision that the policy shall be incontestable "except . . . *for* the restrictions and provisions *applying to* the double indemnity and disability benefits as *provided in Sections 1 and 3 respectively*". They wholly disregard the fact that the language used in the New York Life Insurance policy applies to all of the provisions and conditions relating to double indemnity and disability payments and that the language of the Mutual Life Insurance Co. policy applies only to the restrictions and conditions applying to the double indemnity and total disability provisions; and they completely turn their backs on the obvious fact pointed out in the Pyramid decision (see quotation at page 23 of your argument) that the provisions for payment and the conditions upon which such payments shall

be made (the promise to pay the benefits in question) appear on the face of the policy and are included in the New York Life exception as they are plainly excluded from the Mutual Life exception. As is so ably pointed out in the Deem and Pyramid cases any critical analysis of the language used makes this distinction plain and demonstrates the necessity for reaching opposite conclusions in cases involving the New York Life and the Mutual Life policies.

It should also be noted that the respondents' hope that the denial by the supreme court of a petition for certiorari in the Kaufman case must demonstrate that the supreme court thought that there was no conflict of opinion between the different circuits on an important question of law, is completely answered by the simple statement that at the time of the decision in the Kaufman case, the Stroehmann, Pyramid, Deem and Ruhlin cases had not been decided. The same is true of the Truesdale, the Yerys, and the Horwitz decisions referred to at page 575 of the opinion in the Deem case where the circuit court of appeals for the Fourth Circuit points out as did the circuit court of appeals for the Third Circuit in the Ruhlin case that the Stroehmann case resolved the conflict in federal judicial opinion and indicated the validity of the New York Life exception.

The respondents are attempting to invoke a rule of strict construction originally developed to protect the beneficiaries of innocent policyholders. They are asking the court to apply it to preserve to the respondent, Edward T. Malloy, benefits obtained by fraudulent misrepresentations. It must be apparent that this rule is not to be extended to such a situation or for such a purpose unless the ambiguity is plainly apparent. In the language of the Deem case quoted at page 23 of our argument: "While ambiguities which fairly exist in insurance poli-

cies must be resolved in favor of the insured, it is not permissible for courts by a strained and over-refined construction of ordinary words to create an ambiguity which would not otherwise exist".

We do not care to be heard further.

Very truly yours,

DEMOND, WOODWORTH, SULLOWAY, PIPER & JONES

By Jonathan Piper.

JP:B

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